



4910-57-P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2015-0020]

Buy America Handbook; Conducting Pre-Award and Post-Delivery Audits for Rolling Stock Procurements.

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Availability of Proposed Handbook and Request for Comments.

SUMMARY: The Federal Transit Administration (FTA) has placed in the docket and on its Web site proposed guidance, in the form of a handbook, on complying with FTA's Buy America pre-award and post-delivery audit requirements for rolling stock procurements, from the solicitation phase through final acceptance of the rolling stock. This proposed guidance explains and illustrates how to calculate domestic content of rolling stock, and it is intended for use by recipients of Federal funding, auditors, manufacturers, and suppliers (including subcontractors).

This proposed guidance explains to recipients how to verify and document their compliance with FTA's Buy America pre-award and post-delivery audit requirements. In addition, this proposed guidance encourages recipients, manufacturers, and suppliers to adopt certain best practices to ensure compliance with the pre-award and post-delivery audit requirements. By this notice, FTA invites public comment on this proposed guidance.

DATES: Comments must be submitted by **[INSERT DATE 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]**. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by only one of the following methods, identifying your submission by DOT Docket Number FTA-2015-0020. All electronic submissions must be made to the U.S. Government electronic site at <http://www.regulations.gov>.

- 1) Federal e-Rulemaking Portal: Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- 2) Mail: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
- 3) Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE, between 9 a.m. and 5 p.m. Eastern time, Monday through Friday, except Federal holidays.
- 4) Fax: 202-493-2251.

Instructions: You must include the agency name (Federal Transit Administration) and Docket number (FTA-2015-0020) for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA received your comments, include a self-addressed stamped postcard. All comments received will be posted without change to www.regulations.gov including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477) or <http://DocketsInfo.dot.gov>.

Docket: For access to the docket to read background documents and comments received, go to www.regulations.gov at any time or to the U.S. Department of Transportation, 1200 New Jersey

Avenue, SE, Docket Operations, M-30, West Building Ground Floor, Room W12-140, Washington, DC 20590 between 9:00 a.m. and 5:00 p.m. Eastern Standard Time, Monday through Friday, except Federal holidays.

CONTACTS FOR FURTHER INFORMATION: For program questions, contact Patrick Centolanzi, FTA Office of Program Management, at (202) 366-0234 or *Patrick.Centolanzi@dot.gov*. For legal questions, contact Richard L. Wong, FTA Attorney-Advisor, at (202) 366-4011 or *Richard.Wong@dot.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

- I. Overview
- II. Section-by-Section Summary
 - A. Section 1 – Introduction
 - B. Section 2 – Pre-Award Audit
 - C. Section 3 – Post-Delivery Audit
 - D. Section 4 – Domestic Content Calculations
 - E. Section 5 – Frequently Asked Questions
 - F. Appendices

I. Overview

The FTA’s objective in implementing 49 CFR part 661 (Buy America Requirements) and 49 CFR part 663 (Pre-Award and Post-Delivery Audits of Rolling Stock Purchases) is to support and promote the United States (U.S.) manufacturing industry and U.S. jobs. As guidance on the pre-award and post-delivery audit requirements for rolling stock procurements,

FTA published two separate Buy America handbooks in May 1995—i.e., one for rail vehicle procurements and one for bus procurements.

Over the past three years, FTA has conducted Buy America Compliance Reviews, where they observed and monitored the pre-award and post-delivery audit processes for fourteen capital grants. One primary finding was that FTA should provide more guidance and clarity on conducting pre-award and post-delivery Buy America audits required in FTA’s Buy America regulations (49 CFR parts 661 and 663).

The FTA is proposing to publish a new Buy America handbook, entitled Conducting Pre-Award and Post-Delivery Audits for Rolling Stock Procurements (Handbook), which would replace FTA’s two Buy America handbooks on this subject from 1995. The proposed Handbook would apply comprehensively to rolling stock procurements that are subject to the pre-award and post-delivery audit requirements set forth in 49 CFR part 663.

This notice provides a section-by-section summary of the proposed Handbook. The proposed Handbook itself is not included in this notice; instead, an electronic version may be found on FTA’s web site, at www.fta.dot.gov, and in the docket, at www.regulations.gov. Paper copies of the proposed Handbook may be obtained by contacting FTA’s Administrative Services Help Desk at (202) 366-4865. The FTA seeks comment on the proposed Handbook.

II. Section-by-Section Summary

A. Section 1 – Introduction

Section 1 of the proposed Handbook is an introductory chapter that provides a brief overview of the pre-award and post-delivery audit requirements set forth in 49 CFR parts 661 and 663, summarizes the contents of each subsequent section, and includes lists of relevant legal references, definitions, and acronyms.

This section states that the purpose of the proposed Handbook is to assist recipients,¹ auditors, manufacturers, and suppliers (including subcontractors) in understanding and correctly applying FTA’s Buy America pre-award and post-delivery audit requirements for rolling stock procurements. This section sets forth the scope of the proposed Handbook, explaining that FTA’s Buy America regulations and rulings shall take precedence over the contents of the proposed Handbook in the event of a conflict, and specifying that this new comprehensive Handbook would replace FTA’s two handbooks on this subject, one for rail vehicles and one for buses, which FTA published in 1995.

The FTA seeks comment on the content of this section.

B. Section 2 – Pre-Award Audit

Section 2 describes the pre-award audit requirements set forth in 49 CFR §§ 663.21–27 and explains that the recipient must ensure that the pre-award audit is complete before the recipient enters into a formal contract for the purchase of rolling stock. Pursuant to 49 CFR § 663.23, the pre-award audit must include: a Pre-Award Buy America Certification, a Pre-Award Purchaser’s Requirements Certification, and, where appropriate, a Pre-Award Certification of Compliance with or Inapplicability of Federal Motor Vehicle Safety Standards (FMVSS).

This section outlines what responsibilities the recipient, manufacturer, and/or the supplier each bear with respect to the pre-award audit certifications. For example, this section explains that the recipient is required to obtain the pre-award Buy America certification of compliance from the bidder (i.e., the manufacturer or supplier), and the recipient must keep the certification on file. This section also describes the documentation that recipients must review in determining whether or not the rolling stock to be purchased meets FTA’s Buy America requirements.

¹ That is, recipients “purchasing rolling stock to carry passengers in revenue service with funds made available under sections 3, 9, 18, and 16(b)(2) of the Federal Mass Transit Act, as amended; 23 U.S.C. 103(e)(4); and section 14 of the National Capital Transportation Act of 1969, as amended.” See 49 CFR § 663.3.

This section describes best practices for ensuring compliance with the Pre-Award Buy America Certification requirements, including key steps that recipients should take early in the solicitation process, as well as procedures recipients and manufacturers should adopt for verifying compliance with the domestic content and U.S. final assembly requirements during the pre-award audit stage.

Moreover, this section explains that FTA, at its discretion, may grant a waiver of the Buy America requirements under certain enumerated circumstances.

Furthermore, this section describes recipients' obligations with respect to the Pre-Award Purchaser's Requirements Certification, including the documentation requirements set forth in 49 CFR § 663.27. This section outlines various best practices that recipients should utilize to ensure compliance with 49 CFR § 663.27, including procedures for verifying that the proposed manufacturer's bid complies with the recipient's solicitation specifications and that the proposed manufacturer has the capacity and capability to produce the transit vehicles the recipient is seeking to procure.

Finally, this section describes recipients' obligations with respect to completing a Pre-Award Certification of FMVSS Compliance or Inapplicability, if the procurement is for a motor vehicle(s), and this section explains what documentation the recipient must obtain from the manufacturer regarding FMVSS compliance or inapplicability.

The FTA seeks comment on the content of this section.

C. Section 3 – Post-Delivery Audit

Section 3 describes the post-delivery audit requirements set forth in 49 CFR §§ 663.31–39 and explains that the recipient must ensure that the post-delivery audit is complete after the formal contract has been signed but before title to the rolling stock is transferred to the recipient.

Pursuant to 49 CFR § 663.33, the post-delivery audit must include: a Post-Delivery Buy America Certification, a Post-Delivery Purchaser's Requirements Certification (based upon a review of the Resident Inspector's Report pursuant to 49 CFR § 663.37), and a Post-Delivery Certification of FMVSS Compliance or Inapplicability, where appropriate. This section explains the requisite processes and documentation requirements for each of the post-delivery audit certifications listed above.

This section specifies that a post-delivery audit, as distinguished from a pre-award audit, must be based on actual production data from the manufacturer, including information provided by the supplier to the manufacturer, and the production data must demonstrate Buy America compliance.

This section explains that while the manufacturer can provide its domestic content calculations in terms of percentages rather than dollar figures, the recipient or the third-party auditor must review documentation of the actual costs in order to verify compliance during the post-delivery audit. This section notes, however, that the post-delivery audit report should not include the confidential data that was provided to the recipient or auditor.

This section also describes best practices to aid recipients, manufacturers, and suppliers in achieving compliance with the post-delivery audit requirements, including guidance on how to prepare the requisite Resident Inspector's Report and supporting documentation, in accordance with 49 CFR § 663.37, and procedures for effectively verifying compliance with the domestic content and U.S. final assembly requirements.

Also, as a best practice, this section recommends that manufacturers should require their suppliers to provide sufficient documentation that demonstrates Buy America compliance (such as a signed and dated certification), and manufacturers should then ensure that the suppliers'

documentation is valid. This section also recommends that the manufacturer should be prepared to provide relevant supplier information to the recipient or third-party auditors.

The FTA seeks comment on the content of this section.

D. Section 4 – Domestic Content Calculations

This section provides proposed guidance and clarification on how to calculate domestic content correctly for rolling stock procurements in accordance with 49 CFR § 661.11, providing guidance relevant to both the pre-award audit and the post-delivery audit.

In order to assist recipients, auditors, manufacturers, and suppliers in calculating domestic content, this section defines and clarifies the distinctions between components and subcomponents and between manufacturing and final assembly. Also, this section instructs Handbook readers to refer to Appendices B and C to 49 CFR § 661.11 for lists of typical major vehicle components. These lists are intended to be illustrative, although non-exhaustive.

This section explains that calculation of domestic content is conducted at two levels—i.e., at the vehicle level (which requires that the cost of the components produced in the U.S. must be more than 60 percent of the cost of all components) and at the component level (which requires that more than 60 percent of the subcomponents, by cost, must be of domestic origin for a component to be of domestic origin).

Importantly, this section provides a sample Domestic Content Worksheet with detailed step-by-step instructions for how to fill out the worksheet and calculate domestic content.

Moreover, this section describes best practices for handling special considerations that arise in domestic content calculations. For example, this section identifies typical non-recurring expenses (NREs) and instructs manufacturers to maintain evidence of the NREs for the pre-

award and post-delivery audits. Also, this section provides guidance on exchange rates, transportation costs to the U.S. final assembly location, and tariff exemptions.

In addition, this section provides a sample Buy America certification form to be used by suppliers, with accompanying step-by-step instructions for completing the certification form.

The FTA seeks comment on the content of this section.

E. Section 5 – Frequently Asked Questions

Section 5 addresses some of the most frequently asked questions (FAQs) about pre-award and post-delivery audits. Among numerous other topics, the FAQs concern what types of rolling stock are not subject to the pre-award and post-delivery audit requirements; how to calculate domestic content; and the responsibilities of the resident inspector.

The FTA seeks comment on the content of this section.

F. Appendices

The proposed Handbook contains four appendices. Appendix A contains domestic content calculation worksheets, including one worksheet for rail vehicles and one worksheet for buses.

Appendix B contains sample compliance checklists for recipients, manufacturers, and suppliers to use in order to ensure that the Pre-Award and Post-Delivery Buy America Certifications and Purchaser's Requirements Certifications are properly completed. This appendix also contains a sample Resident Inspector's Report, which the recipient must review before completing its Post-Delivery Purchaser's Requirements Certification.

Appendix C contains sample pre-award and post-delivery certificates and forms. These samples are intended to aid recipients, manufacturers, and suppliers in complying with the 49

CFR parts 661 and 663 requirements, and these samples may be utilized and filled out by these parties, where appropriate.

Appendix D contains a sample pre-award audit report and a sample post-delivery audit report, including necessary certifications and recommended supporting documentation.

The FTA seeks comment on the content of the appendices.

Therese W. McMillan,
Acting Administrator.

[FR Doc. 2015-14711 Filed: 6/15/2015 08:45 am; Publication Date: 6/16/2015]